91-428



NO. A-94

IN THE
**SUPREME COURT**
**OF THE UNITED STATES**

October Term 1991

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PHILIP W. BARNES, COMMISSIONER OF
TEXAS STATE BOARD OF INSURANCE, *et al.*
*Petitioners,*

*v.*

E-SYSTEMS, INC. GROUP HOSPITAL
MEDICAL & SURGICAL INSURANCE PLAN, *et al.*
*Respondents*

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# INDEX TO APPENDIX

**E-SYSTEMS, INC. Group Hospital Medical & Surgical Insurance Plan, et. al., Plaintiffs-Appellees,**

**v.**

**A. W. POGUE, Commissioner of the Texas State Board of Insurance, Defendant-Appellant.**

**LA QUINTA MOTOR INNS, INC., Plaintiff-Appellee,**

**v.**

**Richard F. REYNOLDS, as a Member of the Texas State Board of Insurance, et al., Defendants-Appellants.**

**Nos. 89-1707, 89-1709.**

United States Court of Appeals,
Fifth Circuit.

May 1, 1991.

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Appeals from the United States District Court for the Western District of Texas.

Before BROWN, POLITZ, and JOHNSON,

Circuit Judges.

POLITZ, Circuit Judge:

In these consolidated cases the district court found that the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, preempts the Texas Administrative Services Tax Act (ASTA), Tex. Ins. Code art. 4.11A, as it relates to ERISA plans, enjoined the collection of the tax, and directed a return of the monies wrongfully received therefrom. The State appeals, contending that the federal court lacked jurisdiction by virtue of the Tax Injunction Act, 28 U.S.C. §1341, and the eleventh amendment and, even assuming the court had jurisdiction, the State contends that the tax at issue is not preempted by ERISA. Finding no merit in appellant's assignments of error, we affirm the judgment of the district court in each of the cases.

*Background*

In 1987 Texas enacted ASTA imposing a 2.5% annual tax on each person "receiving any form of administrative or service fee, consideration, payment, premium, fund, reimbursement, or compensation" for providing a service for

> any employer-employee, multiple employer-employee, self-insurance group, member, or other medical, accident, sickness, injury,

> indemnity, death, or health benefit plan, including but not limited to any medical, surgical, orthopedic, chiropractic, physical therapy, speech pathology, audiology, mental health, dental, hospital, workers' compensation, optometric, or health maintenance organization plan or program, but excluding any portion of such plan for which premiums for insurance are received by the carrier and are otherwise subject to taxation by this state ....

Tex. Ins. Code art. 4.11A § 1. These plans are virtually identical to those covered by ERISA, 29 U.S.C. § 1002(1), which prescribes:

> The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) or the

> Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

For purposes of describing the scope of its tax, ASTA defines administrative or service fees to include

> the total gross amount of all consideration, fees, payments, reimbursements and all compensation received by the carrier or other person during the taxable year for each and every kind of such service, activity, or function described ... and
>
> the total amount of all claims and benefits paid to or on behalf of employers, multiple employers, employees, unions, beneficiaries, trust members, spouses, dependents or other persons under a plan ....

ASTA, art. 4.11A § 3(2)(A) & (B). Thus, although ASTA purportedly taxes only "administrative" or "service" fees, these by definition include both the administrative fees and the sums received by beneficiaries of the plans.

If the person liable for the tax fails to make payment ASTA imposes liability on the plan. Apparently aware of the shaky ground upon which ASTA was treading, the Texas legislators provided that no tax liability would accrue if

collection or retention of the tax was preempted by federal law. Shortly before the first ASTA tax was due the Texas State Board of Insurance issued an emergency rule, now made permanent, that the "person" who first has possession or control over the assets "utilized or required by the payment of the gross amount of administrative or service fee ... shall be primarily liable for the tax." Tex.Admin.Code, title 28, § 7.1704(a). ASTA § 3(4) defines person to include any individual, corporation, plan, or other legal entity.

La Quinta Motor Inns, Inc. and E-Systems, Inc. (hereafter "sponsors") each developed an employee welfare benefits plan regulated by ERISA. They undertook the administrative and management functions of their plans, as well as the responsibility for appointment of plan administrators and amendment and termination of the plans, thus assuming a fiduciary relationship with their respective plans. Both plans are self-insured and self-administered, receiving contributions from the sponsors and, to a limited extent, from the employee participants. The State demanded payment of the tax, which the sponsors paid under protest. The sponsors filed separate suits, seeking a declaration that ERISA preempts ASTA and asking for appropriate injunctive relief. The district court first held that the suits were not barred by the Tax Injunction Act and then granted summary judgment to the plaintiffs, holding that ASTA is preempted by ERISA, as relates to the two plans

at issue, and enjoining further enforcement. The court ordered a return of the sums collected. The State timely appealed; we consolidated the cases for appellate consideration.

*Analysis*

The State first contends that the district court lacked jurisdiction to entertain these cases because of the Tax Injunction Act which provides that "district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under the state law where a plain, speedy, and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341. This would include a declaratory judgment action. *California v. Grace Brethren Church*, 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982). We find this argument unpersuasive because of the preemption factor. Congress empowered any participant or beneficiary of an ERISA-regulated plan to bring a civil action "to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan," 29 U.S.C. § 1132(a)(3), but Congress specifically directed the "exclusive jurisdiction" of such actions in the federal district courts. 29 U.S.C. § 1132(e). State courts lack jurisdiction to decide the dispositive issue in this case--whether ERISA preempts ASTA. It necessarily follows that there can be no effective state remedy under the Tax Injunction Act which, therefore, is inapplicable in an ERISA setting.

That leads then to the essential question: Does ERISA preempt in the cases at bar? Under the Supremacy Clause, Congress has the power to preempt state laws. U.S. Constitution, Art. VI. Did Congress exercise that power when it enacted ERISA? We conclude that it did, for Congress therein declared:

> Except as provided in subsection (b) of this section [the savings clause], the provisions of this title and title IV shall supersede any and all State laws insofar as they now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)].

29 U.S.C. § 1144(a). The Supreme Court has given this clause a very broad reading, considering the language "deliberately expansive" in order to ensure that the regulation of employee benefit plans remains within the federal forum. *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 46, 107 S.Ct. 1549, 95 L.Ed.2d 39, 46 (1987). The preemptive scope of ERISA is "intended to apply in the broadest sense in all actions of State or local governments which have the force of law." *Id.*, 107 S.Ct. at 1552. Most recently the Court observed: "The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA." *FMC Corporation*

*v. Holliday*, ___ U.S. ___, 111 S.Ct. 403, 407, 112 LEd.2d 356 (1990).

In *Holliday* the Court noted that the savings clause permitted the state to enforce its insurance regulations, subject to the limitations of the "deemer" clause. The Court declared:

> Under the deemer clause, an employee benefit plan governed by ERISA shall not be 'deemed' an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws 'purporting to regulate' insurance companies or insurance contracts.

*Id.*, 111 S.Ct. at 407.

Reflective of the broad reach of the statute, the Supreme Court has found preemption of state laws which only collaterally or indirectly affected employee benefit plans. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981).

The State asserts that ASTA does not "relate to" the plans, insisting that it does not affect "relations among the principal ERISA entities--the employer, the plan, the plan fiduciaries and the beneficiaries ...." *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises*, 793 F.2d 1456, 1467 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837 (1987). The State contends

that ASTA's mere economic impact on a plan is an insufficient reason to invalidate the tax. We do not agree.

We are directed to give the term "relates to" the broadest possible reasonable interpretation. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96, 103 S.Ct. 2890, 2899, 77 L.Ed.2d 490 (1983). Even without doing so, it is apparent that ASTA "relates to" the two ERISA plans. Nearly all of the relationships referred to in *Sommers* are affected. The tax is calculated as, *inter alia*, a percentage of all claims paid and disbursements made by the plans each year. The payment is one year removed thus reducing future assets and the capability of the plans to pay benefits. The cost of the plan must therefore increase for the employer and/or employees or the benefits must be adjusted downward to offset the tax bite. This is the type of impact Congress intended to avoid when it enacted the ERISA legislation.

That Congress intended to preempt state taxation laws can no longer be gainsaid. When Congress amended ERISA to exclude Hawaii's Prepaid Health Care Act from the preemption clause, it added a specific provision that state tax laws were not exempt from preemption. 29 U.S.C. § 1144(b)(5)(B)(i). The conference report on the legislation is illuminating for it stated simply that "the preemption *is continued* with respect to ... any State tax law relating to employee benefit plans ...." 1982 U.S.Code Cong. &

Admin.News 4603 (emphasis added). The congressional intent appears clear, state tax laws were preempted even before they were specifically enumerated in the amended statute.

The Texas legislation is not saved by the insurance savings clause. Although that clause lifts the effect of the preemption from any state law which regulates "insurance, banking or securities," 29 U.S.C. § 1144(b)(2)(A), the deemer clause, 29 U.S.C. § 1144(b)(2)(B), declares that no state law regulating insurance shall deem an ERISA plan to be engaged in the business of insurance. Even if ASTA fit within the protective reach of the insurance savings clause, of which we are not persuaded, the deemer clause would prevent its application. Our conclusion is guided by the recent *Holliday* decision in which the Supreme Court instructed:

> We read the deemer clause to exempt self-funded ERISA plans from state laws that 'regulat[e] insurance' within the meaning of the savings clause. By forbidding States to deem employee benefit plans 'to be an insurance company or other insurer ... or to be engaged in the business of insurance,' the deemer clause relieves plans from state laws 'purporting to regulate insurance.' As a result, self-funded ERISA plans are exempt from state regulation insofar as that regulation 'relate[s] to' the plans.

111 S.Ct. at 409.

Having concluded that ASTA is preempted by ERISA we need proceed no further. The State received monies from the ERISA plans to which it was not entitled. The funds must be returned. The parties are to be restored to the status quo ante. That includes appropriate consideration of the loss of use of the funds for the period involved, an issue pending before this court in another appeal.

The judgment of the district court in each of the consolidated cases is AFFIRMED in all respects.

JOHN R. BROWN, Circuit Judge, concurring.

I concur fully in the Court's opinion. But in doing so, I wish to emphasize why the most potent threat to our decision--the Tax Injunction Statute, 28 U.S.C. § 1341--is non-existent.

Urged earnestly by Texas state authorities is the sweeping provision of the statute:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

On the face of things, the complaint here is that ASTA is unconstitutional because it is

preempted by ERISA, the determination of which can, and ought to, be by Texas courts in the first instance. The awkwardness of this otherwise plausible contention is best illustrated by assuming we were to adopt it: because of ERISA's sweeping preemption, the Texas court having the injunction against the tax before it would have to determine whether that action was preempted. The Court's decision would raise thorny questions of review. Review would have to be through the Texas appellate hierarchy with the ultimate hope of Supreme Court review by certiorari. 28 U.S.C. § 1254 (Supp.1990). Not that the Texas appellate courts would not have the duty or power to determine the question of ERISA preemption, but the consequences of the Texas courts declaring such preemption would compel dismissal of the Texas court injunction effort.

Now all such confusing possibilities are eliminated by two recent opinions of the Texas Supreme Court,[1] especially in *Gorman*. In an exhaustive opinion by Justice Gonzalez, *Gorman* directly and in effect holds that where the controversy is preempted by ERISA, the state

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[1] *Pamela Chambers Gorman v. Life Insurance of North America, et al.*, ___S.W.2d ___ (1991) [34 The Texas Supreme Court Journal, 457].

*James C. Cathey, et al. v. Metropolitan Life Insurance, et al.*, ____ S.W.2d ___ (Tex. 1991) [34 The Texas Supreme Court Journal, 309].

court lacks subject matter *jurisdiction* and that exclusive jurisdiction is in the federal courts.[2]

Except for state court cases asserting one or more of the three claims specifically identified in § 1132(a)(1)(B), ERISA preemption "would deprive state courts of subject-matter jurisdiction to hear the claim."[3] Unlike preemption as an "affirmative defense," which can be waived, preemption of the case as not within the limited scope of § 1132(a)(1)(B) "is jurisdictional in nature and cannot be waived."[4]

Since the Supreme Court of Texas, by its own deliverance, would have to hold a state court injunction suit preempted, there is nothing to be served by our initially requiring it.

Because of this consequence, we do not have to determine whether ERISA amounts, in effect, to an implied repeal of the federal Tax Injunction statute. Preemption by ERISA is self-executing to make the Tax Injunction statute of no consequence.

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[2] *See Gorman,* ___ S.W.2d ___ [34 Tex. Sup Ct. J. at 460].

[3] *Id.* at ___ [34 Tex.Sup.Ct. J. at 460].

[4] *Id.* at ___ [34 Tex.Sup.Ct. J. at 459].

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 90-8457
(Summary Calendar)

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E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL, AND SURGICAL INSURANCE PLAN, ET AL.,

Plaintiffs-Appellees,

versus

A. W. POGUE, Commissioner of the Texas State Board of Insurance,

Defendant-Appellant.

CONSOLIDATED WITH

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No. 90-8460
(Summary Calendar)

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LA QUINTA MOTOR INNS, INC.,

Plaintiff-Appellee,

versus

RICHARD F. REYNOLDS, Etc.,
ET AL.,

Defendants-Appellants.

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Appeal from the United States District Court
for the Western District of Texas
(A-89-CA-148 & A-89-CA-447)

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(May 14, 1991)

Before BROWN, POLITZ, AND JOHNSON, Circuit Judges.

PER CURIAM:*

In a parallel case we resolved the question of ERISA preemption and the applicability of the Tax Injunction Act to the Texas Administrative Services Tax Act, Tex. Ins. Code art. 4.11A. **E-Systems, Inc. Group Hospital Medical & Surgical Insurance Plan, Et Al. v. A. W. Pogue, Commissioner of the Texas State Board of Insurance**, No. 89-1707, consolidated with **La Quinta Motor Inns, Inc. v. Richard F. Reynolds, as a Member of the Texas State Board of Insurance, Et. Al.**, No. 89-1709,

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*Local Rule 47.5 provides: "The publication of opinons that have no precedential value and merely decide particular cases on the basis of well-settled principles of law impose needless expense on the public and burdents on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

____ F.2d ____ (5th Cir. 1991). The sole issue presented by this appeal is the award of prejudgment and postjudgment interest.

Federal law clearly provides for postjudgment interest. "Interest shall be allowed on any money judgment in a civil case recovered in district court." 28 U.S.C. § 1961(a). The trial court appropriately allowed such.

The award of prejudgment interest under ERISA is discretionary with the trial court. **Whitfield v. Lindemann**, 853 F.2d 1298 (5th Cir. 1988), cert. denied, sub nom. **Klepak v. Dole**, 490 U.S. 1089 (1989). The trial court chose to make the plaintiffs whole by awarding in prejudgment interest the equivalent of the return on investments that the funds used to pay the taxes would have earned for the ERISA plans. Whether characterized as an award of damages or as prejudgment interest the result is the same -- the ERISA plans are made whole for the temporary loss of use of the funds improperly collected by the defendants. The parties are thus restored to *status quo ante*.

AFFIRMED.

Supreme Court of the United States

*No.* A-94

PHILIP W. BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, ET AL.,
Applicants,

v.

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL & SURGICAL INSURANCE PLAN, ET AL.

ORDER

UPON CONSIDERATION of the application of the Attorney General of Texas,

IT IS ORDERED that the execution and enforcement of judgments of the United States Court of Appeals for the Fifth Circuit, case Nos. 89-1707, 89-1709, 90-8457 and 90-8460 are stayed pending the timely filing of a petition for a writ of certiorari. Should the petition for a writ of certiorari be so timely filed, this order is to remain in effect pending this Court's action on the petitiion (sic) for a writ of certiorari. If the petition for a writ of certiorari is denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this order is to remain in effect pending the sending down of the judgment of this Court.

s/ Antonin Scalia
Associate Justice of the
Supreme Court of the
United States

Dated this 2nd day of
August, 1991

SUPREME COURT OF THE UNITED STATES

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A-94

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PHILIP W. BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, ET AL., APPLICANTS *v* E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL & SURGICAL INSURANCE PLAN ET AL.

ON APPLICATION FOR STAY

[August 2, 1991]

JUSTICE SCALIA, Circuit Justice.

Texas state officials responsible for the collection of taxes and the regulation of insurance seek a stay of the judgments of the Court of Appeals for the Fifth Circuit in these two sets of consolidated cases, pending action by this Court on their intended petition for certiorari. The judgments at issue upheld decisions by the United States District Court for the Western District of Texas which declared the Texas Administrative Services Tax Act, Tex. Ins. Code Ann. art. 4.11A (Supp. 1991), to be preempted by the Employee Retirement Income Security Act (ERISA), 88 Stat. 829, as amended, 29 U.S.C. §1001, *et seq.* (1988 ed. and Supp. I), enjoined its enforcement, and directed the State to issue refunds to the challenging taxpayers. *E-*

*Systems, Inc.* v. *Pogue*, 929 F.2d 1100 (CA5 1991).

The authority for a single Justice to issue a stay of the sort requested here is conferred by 28 U.S.C. §2101(f). Before the predecessor to that provision was enacted in 1925, see Act of Feb. 13, 1925, 43 Stat. 940, similar action could be taken by the Court by issuing a *supersedeas* under the All Writs Act, 28 U.S.C. §1651. See *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923); *Ex parte The Milwaukee Railroad Co.*, 72 U.S. (5 Wall.) 188, 190 (1867); *Hardeman v. Anderson*, 45 U.S. (4 How.) 640, 642-643 (1846). Under §2101(f), as under the All Writs Act and the prior common law, a stay issues not of right but pursuant to sound equitable discretion; "it requires," as Chief Justice Taft said, "a clear case and decided balance of convenience." *Magnum Import Co., supra*, at 164.

The practice of the Justices has settled upon three conditions that must be met before issuance of a §2101(f) stay is appropriate. There must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted), a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed. *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (Powell, J., in chambers). In my view all three of these conditions are met here.

The Tax Injunction Act, 28 U.S.C. §1341, provides: "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Fifth Circuit's holding that this provision does not apply to state taxes that violate ERISA is in apparent conflict with the position taken by the Ninth Circuit. See *Ashton v. Cory*, 780 F.2d 816, 821-822 (CA9 1986) (Kennedy, J.). See also *General Motors Corp. v. California Board of Equalization*, 815 F.2d 1305, 1308 (CA9 1987) (Kennedy, J.). The question has been explicitly reserved in an opinion of this Court. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 20 n.21, 27 n.31 (1983). The establishment of an ERISA exception to the Tax Injunction Act is alone a matter of some importance to the States. In addition, however, the Fifth Circuit's basis for the exception is that there can be no "plain, speedy, and efficient remedy" in Texas courts because ERISA forbids *their* consideration of ERISA-preemption challenges. *E-Systems, Inc., supra*, at 1102. This means, apparently, that state courts cannot even grant refund relief, since we have held that refund relief alone may constitute "a plain, speedy, and efficient remedy." See, *e.g.*, *California v. Grace Brethren Church*, 457 U.S. 393, 413-414 (1982); *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 514-515 (1981). In addition, the Fifth Circuit rejected without explanation, applicants' objection that

the Eleventh Amendment forbade the district court from requiring a refund of the ERISA-preempted taxes from Texas's State Treasury. *E-Systems, Inc., supra*, at 1101-1102. This is also in apparent conflict with the views of the Ninth Circuit. See *General Motors Corp. supra*, at 1309. In my view these issues are of sufficient importance that a grant of certiorari by this Court is probable.

I also think there is a substantial possibility that the judgment below will be reversed. The Fifth Circuit's construction of the Tax Injunction Act and ERISA assumes that ERISA's creation of a private cause of action to enjoin violations of ERISA, 29 U.S.C. §1132(a)(3), and, its provision that this cause of action can be brought only in federal court, *id.* §1132(e)(1), implicitly deprive the state courts of jurisdiction to entertain claims for monetary or equitable relief that rest upon the invalidity (under the Supremacy Clause) of a state statute that violates ERISA. That is not an inevitable implication, and perhaps not a likely one. The Fifth Circuit's position on the Eleventh Amendment presumably rests upon the proposition that ERISA has impliedly authorized suit against states for monetary (as well as injunctive) relief, thus abrogating state sovereign immunity. But ERISA makes no mention of monetary relief, and in any event our cases do not favor implicit abrogation of Eleventh Amendment immunity. See *Dellmuth v.*

*Muth*, 491 U.S. 223, 230 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

As to the third condition, the likelihood of irreparable harm: In my view the Tax Injunction Act itself reflects a congressional judgment, with which I agree, that unlawful interference with state tax collection always entails that likelihood. It produces in all cases not merely the possibility of ultimate noncollection because of the taxpayer's exhaustion of the funds but also an interference with the State's orderly management of its fiscal affairs.

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective government, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public." *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871).

See also *California v. Grace Brethren Church, supra*, at 410 and n. 23. The same may be said of the asserted Eleventh Amendment violation: directing a priority expenditure from the state

treasury "may derange the operations of government, and thereby cause serious detriment to the public."

The conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*. Even when they all exist, sound equitable discretion will deny the stay when "a decided balance of convenience," *Magnum Import Co., supra*, at 262 U.S., at 164, does not support it. It is ultimately necessary, in other words, "to 'balance the equities' -- to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan J., in chambers) (citations omitted). The likelihood that denying the stay will permit irreparable harm to the applicant may not clearly exceed the likelihood that granting it will cause irreparable harm to others. (This depends, of course, not only upon the relative likelihood that the merits disposition one way or the other will produce irreparable harm, but also upon the relative likelihood that the merits disposition one way or the other is correct). Or the irreparable harm threatened to the applicant, while more likely, may be vastly less severe. The balancing seems to me quite easy in the present case, since I am aware of no irreparable harm that granting the stay would produce. The State's credit remains good, and I have been advised of no emergency need for the funds already paid under protest or for any funds that will be collected before termination of this litigation.

The application for stay of the judgments of the Fifth Circuit Court of Appeals is granted, pending applicants' timely filing and this Court's disposition of a petition for certiorari.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

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| E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL AND SURGICAL INSURANCE PLAN, ET AL | § | CIVIL NO. A-89-CA-148 |
| VS. | § | |
| A. W. POGUE, COMMISSIONER OF THE TEXAS STATE BOARD OF INSURANCE | § | |

ORDER

Before the Court is Defendant's Motion to Dismiss, as well as Plaintiffs' response. For the reasons set forth in this Court's November 17, 1988 Order in John R. Birdsong, et al. v. Edwin J. Smith, Jr., et al., Cause No. A-88-CA-185, the Court will Deny Defendant's Motion.

ACCORDINGLY, IT IS ORDERED that Defendant's Motion to Dismiss is DENIED.

SIGNED AND ENTERED this 6th day of July, 1989.

/s/James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

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| LA QUINTA MOTOR INNS, INC. | § | |
| | § | |
| VS. | § | CIVIL NO. |
| | § | A-89-CA-447 |
| RICHARD F. REYNOLDS AS | § | |
| A MEMBER OF THE TEXAS | § | |
| STATE BOARD OF | § | |
| INSURANCE, ET AL. | § | |

ORDER

Before the Court is Defendants' May 12, 1989 Motion to Dismiss, as well as Plaintiff's May 19, 1989 response. This Court has previously considered all of the arguments for dismissal raised by Defendants in this proceeding. In John R. Birdsong, et al. v. Edwin J. Smith, et al., Cause No. A-88-CA-185, the (sic) entered an Order considering the arguments and finding them without merit. For the reasons articulated in this Order of the Court, entered in Birdsong on November 17, 1988, the Court will deny Defendants' Motion to Dismiss filed in this action.

ACCORDINGLY, IT IS ORDERED that Defendants' Motion to Dismiss is DENIED.

SIGNED AND ENTERED this 23rd day of May, 1989.

/s/James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

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| JOHN R. BIRDSONG, ET AL. | § | |
| VS. | § | CIVIL NO. A-88-CA-185 |
| EDWIN J. SMITH, JR., ET AL. | § | (CONSOLIDATED) |

ORDER

Before the Court for consideration are Defendants' numerous Motions to Dismiss which have been filed in the twelve cases which have been consolidated and are proceeding under the above-styled and numbered cause.[1] The several Plaintiffs involved in this controversy filed responses to the Motions to Dismiss which the Court has considered. The Court, after reviewing the Motions to Dismiss and the responses thereto as well as the entire record in this case, finds

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[1]The twelve consolidated cases are listed in the Court's consolidation order filed August 15, 1988. In each of those cases prior to consolidation, Defendants filed essentially the same motion to dismiss raising identical arguments for dismissal. The Court has reviewed each motion and enters this Order which addresses all of Defendants' arguments. This Order therefore disposes of each and every motion to dismiss filed in the cases prior to consolidation.

that the motions lack merit and should be denied for the following reasons.

This is a consolidated action for declaratory, injunctive, and other equitable relief arising under section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(a)(3), and the United States Constitution. The Plaintiffs involved in this consolidation action consist of "employee welfare benefit plans" and "fiduciaries" of or "participants" in such plans within the meaning of ERISA. See, 29 U.S.C. §§ 1002(1), (7) and (21)(A). Defendants are various officials of the State of Texas who are charged with enforcing Article 4.11A of the Texas Insurance Code, otherwise known as the Texas Administrative Services Tax Act ("ASTA"). See TEX. INS. CODE ANN. art. 4.11A (Vernon Supp. 1988). Plaintiffs have filed these consolidated lawsuits alleging that ASTA and the Emergency Rule implementing the Act, 28 T.A.C. §§ 7.1701-7.1711 (Feb. 26, 1988), are preempted by section 514 of ERISA and violate the supremacy clause of Article VI of the United States Constitution. Several of the Plaintiffs which have already made quarterly payments under protest seek a return of those payments in addition to declaratory and injunctive relief. Defendants have responded to these allegations by filing the motions to dismiss under consideration, generally raising the four following arguments in support of dismissal:

1. that the Court lacks subject matter jurisdiction over this controversy and that plaintiffs have failed to state a claim upon which relief may be granted since the Tax Injunction Act, 28 U.S.C. § 1341, bars the entire action;

2. that the principle of comity warrants the dismissal of this action;

3. that the abstention doctrines warrant the dismissal of this action; and

4. that the Eleventh Amendment bars this action.[2]

See Defendants' Motion to Dismiss filed August 19, 1988 in Smith Industries, Inc. v. Doyce R. Lee, et al., A-88-CA-625.

The Court shall address each of these alternative arguments for dismissal in turn and demonstrate why dismissal is inappropriate.

## I. THE TAX INJUNCTION ACT DOES NOT BAR THIS ACTION.

The Tax Injunction Act provides:

The district court shall not enjoin, suspend

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[2]Defendants also argue in two individual cases, John R. Birdsong, et al. v. Edwin J. Smith, Jr., et al., A-88-CA-185, and Dan Harding, et al. v. Edwin J. Smith, et al., A-88-CA-239, that certain Plaintiffs suing as plan participants lack "taxpayer" standing to bring these actions under Article 4.11A of ASTA. Defendants' challenge to the standing of these particular Plaintiffs is misplaced, however, since these Plaintiffs are authorized as participants to bring these claims under ERISA §§ 502(a) and (e).

> or restrain the assessment, levy or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in the courts of such states.

28 U.S.C. § 1341. Section 503(a)(3) of ERISA allows a "participant, beneficiary, or fiduciary" to enjoin alleged violations of ERISA or to enforce provisions of ERISA. Section 502(e)(1) of ERISA states in pertinent part that "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary [of Labor], or by a participant, beneficiary, or fiduciary." Although sections 502(a)(3) and (e)(1) do not specifically refer to the Tax Injunction Act, section 514(d) of ERISA provides:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . .

The initial question is whether ERISA constitutes an exception to the Tax Injunction Act. In other words, does the Tax Injunction Act bar a plaintiff's action in federal court challenging that a state tax is preempted by ERISA. The Fifth Circuit has not yet resolved this issue. The Ninth Circuit, however, addressed this issue in, Ashton v. Cory, 780 F.2d 816 (9th Cir. 1986), a case involving procedural circumstances significantly different than those present in this action. The Ninth Circuit found

that Congress did not intend for ERISA section 502(e)(1) to be an exception to the Tax Injunction Act. Id. at 822. The United States Supreme Court, in Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 20 n.21 (1983), recognized but did not resolve the apparent conflict between ERISA and the Tax Injunction Act. The Court stated that in order for a Plaintiff to sue under ERISA to enjoin or declare invalid a state tax levy despite the Tax Injunction Act, the Plaintiff must show either that the state law provides no "plain, speedy, and efficient remedy" or that Congress intended section 502 of ERISA to be an exception to the Act. Id. In the present case, Plaintiffs have advanced various arguments in support of both of these points. The Court finds that Plaintiffs have shown that an adequate remedy is not available in state court and that the Tax Injunction Act should not bar this action.

It is well-settled that "a state-court remedy is 'plain, speedy and efficient' only if it 'provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the [disputed state] tax.'" California v. Grace Brethren Church, 457 U.S. 393, 411 (1981). It is also clear that some opportunity to raise constitutional objections is the most important consideration in deciding whether the state court remedy is adequate. Id. at 412 n.26; Rosewell v. La Salle National Bank, 450 U.S. 503, 515, 517 n.19 (1981). A state remedy, moreover, is not

plain within the meaning of the Tax Injunction Act, if there is uncertainty regarding its availability or effect. Such uncertainty lifts the bar to federal court jurisdiction. Rosewell, 450 U.S. at 516-17. The Court is of the view that Plaintiffs have adequately demonstrated that there exists a substantial amount of uncertainty regarding the various state remedies which Defendants claim are available.

First, to the extent that any Plaintiff seeks a declaratory judgment that ASTA violates the Supremacy Clause of the United States Constitution through the application of ERISA section 514, such action can only be maintained in federal court under the exclusive jurisdiction provision of section 502(e). General Motors v. California Board of Equalization, 815 F.2d 1305, 1309 (9th Cir. 1987), cert. denied, 108 S.Ct. 1122 (1988). A Texas state court would lack jurisdiction of any action commenced by Plaintiffs challenging the validity of the ASTA tax under ERISA's preemption clause, section 514, thereby depriving Plaintiffs of any state judicial determination of this important consitutional issue. Further, even though a defensive claim of ERISA preemption raised by a plan fiduciary, participant or beneficiary does not provide a basis for federal removal jurisdiction and would therefore have to be addressed by the state court, Franchise Tax Board, 463 U.S. at 21-22, the procedural posture and party alignment involved in the tax protest suits currently pending in state court would not

allow for a judicial determination of the preemption issue.

In addition, those Plaintiffs who do not constitute taxpayers within the meaning of ASTA have no remedy in state court. Under ASTA, a "taxpayer" is granted a right to challenge the statute which he may exercise pursuant to Chapter 112 of the Tax Code only by rendering a payment under protest and then filing suit. TEX. INS. CODE ANN. art. 4.11A § 9(a) (Vernon Supp. 1988). Defendants argue that an additional remedy lies in section 112.101 of the Tax Code which authorizes injunction actions by persons who have paid a disputed tax or filed a bond in lieu of paying the tax. This injunctive remedy, as in the case of the protest suits, would be available only to a party recognized as a taxpayer.

Defendants concede that "the plan is not a taxpayer under Texas law" and that "it is not the intent of the State of Texas to tax the plan." See Defendants' Memorandum of Law in Support of Motion to Dismiss, p. 3, filed August 19, 1988 in Smith Industries, Inc. v. Doyce R. Lee, et al., A-88-CA-625. Defendants base this concession upon section 4(d) of ASTA which states that "the tax imposed under this article creates no duty and shall not be collected to the extent preempted or prohibited under the constitution of this State or the United States." Defendants further admit that "the plan itself cannot be taxed if to do so would be derogation of applicable state and

federal laws". Id. Thus, in deciding not to recognize plans as ASTA taxpayers, Defendants have effectively precluded these plans from utilizing the exclusive remedies made available under section 9(a) of ASTA. The Plaintiff plans involved in the pre-consolidation case of The LTV Corp., et al. vs. Edwin J. Smith, Jr., et al., A-88-CA-517, as nontaxpayers would therefore be unable to file a protest suit under ASTA section 9(a) or seek injunctive relief under section 112.101 of the Tax Code. Additionally, the individual Plaintiff participants, who are employees of the sponsoring employers and are members of the various plans on behalf of which Plaintiff fiduciaries are suing, obviously are not ASTA taxpayers and would therefore also be unable to seek relief through a protest suit or an injunction action.

Finally, with respect to the Plaintiff fiduciaries involved in this action, it is at best uncertain whether they are considered taxpayers under either ASTA or section 112.101 of the Tax Code. The main argument advanced by this group of Plaintiffs is that the collection of any taxes from them under ASTA violates the supremacy clause of the United State Constitution by virtue of ERISA's preemption clause, § 514, 29 U.S.C. § 1144. Applying the same reasoning employed by Defendants in conceding that the plans themselves are not considered taxpayers, Plaintiff fiduciaries also could not be taxed under the express prohibition contained in section 4(d) of ASTA if ERISA preempts the ASTA

taxation of these fiduciaries. Moreover, the Plaintiff fiduciaries have brought their suits under ERISA section 502(a) on behalf of their respective plans. Since Defendants concede that the plans are not taxpayers, their fiduciaries, who sue on their behalf, likewise cannot be considered taxpayers, at least in the capacity in which they have filed their ERISA claims.

In addition to the tax protest procedures and injunctive relief, Defendants claim that Plaintiffs have the alternative remedy afforded by section 9(b) of ASTA of filing a refund suit with legislative consent. As stated by the Plaintiffs in Texas LP-Gas Master Insurance Trust, et al. v. Edwin J. Smith, Jr., et al., A-88-CA-214:

> This requires that an aggrieved party convince a state legislator to introduce a bill specifically authorizing a suit against the State for a refund of the [ASTA tax] wrongfully collected. This bill then must be passed by the Legislature which, although it customarily passes such bills, can, and has, voted them down. Such a remedy during an economic downturn is highly speculative and hardly the "plain, speedy and efficient remedy" contemplated by the Tax Injunction Act.

See Plaintiffs' Response in Opposition to Defendants' First Amended Motion to Dismiss, filed May 18, 1988.

Assuming, for the sake of analysis, that Plaintiffs do have standing or could readily obtain legislative consent to file suit for a refund, the Court finds that the availability of a refund under ASTA is highly uncertain as demonstrated by the Defendants' own representations. On May 13, 1988, the Court entered an Order denying Plaintiffs' request to deposit tax payments into the registry of the Court. This Order was entered in the case of American Airlines, Inc., et al. v. Doyce R. Lee, Commissioner of the Texas State Board of Insurance, A-88-CA-186, prior to consolidation. The Court found that Plaintiffs had not demonstrated there was a substantial likelihood that taxes paid pursuant to ASTA could not be refunded. The Court made this finding on the basis of the Defendants' representations that adequate authority for the refund existed under Texas Government Code § 403.076, and the Appropriations-General Act, ch. 78, § 29, 1987 Tex. Sess. Law. Serv. 515, 1108 (Vernon). The Court also expressly relied upon the corroborating affidavit testimony of T. C. Mallet, Director of Fund Accounting and Executive Assistant for Budget Administration of the Office of the Comptroller Public Accounts of the State of Texas.

On September 26, 1988, the Honorable Pete Lowry, state district judge, entered a temporary injunction order in favor of the Plaintiffs in ARCO Employee Welfare Benefit Trust, et al. v. Doyce R. Lee, et al., No. 443,515, a related case

pending in the 53rd Judicial District Court of Travis County, Texas. At the September 12, 1988 hearing held on this matter, the state Defendants once again argued that a refund of taxes paid under ASTA was available. The state Defendants, however, claimed that Texas Government Code section 403.077, rather than section 403.076 of the Texas Government Code and section 29 of the Appropriations-General Act, provided the statutory basis for refund. Mr. T. C. Mallett, in fact, testified at the hearing and admitted that section 403.076 does not provide any authority for a refund of ASTA tax payments. See State Court Transcript, p. 156, lines 17-19. Mr. Mallett's testimony also indicates that (1) an ASTA refund has never been made, (2) he has never actually conferred with the Comptroller regarding ASTA refunds, and (3) he has not considered the effect of the State legislature's assertion of sovereign immunity with respect to refunds pursuant to section 9(b) of ASTA. Id. at pp. 152-154, 170. Now that the State has abandoned section 403.076 as a basis for a refund, the Court must determine whether section 403.077 provides an avenue for the Plaintiffs to seek a refund.

Section 403.077 authorized a refund of money collected "through mistake of fact or law." The Texas Supreme Court construed this precise language in Bullock v. Hewlett-Packard Co., 628 S.W.2d 754 (Tex. 1982), and held that a legislative enactment of an allegedly unlawful tax is "not the kind of 'mistake of law' covered

[by the predecessor statutory provision to section 403.077]." Id. at 757. The State through the testimony of Mr. Mallett has now conceded that neither section 29 of the Appropriations-General Act nor section 403.076 authorize a refund of the ASTA tax. The Court has found that section 403.077 does not apply. Therefore, the absence of a means for obtaining a refund serves as additional proof that the remedy required by the Tax Injunction Act is lacking.

In summary, Plaintiffs do not have a plain, speedy and efficient remedy in state court since: (1) the state courts lack jurisdiction to render a declaratory judgment that ASTA violates the Supremacy Clause of the United States Constitution through the application of ERISA's preemption clause; (2) Plaintiffs, to the extent they are considered nontaxpayers or nontaxable, lack standing to file a tax protest suit under ASTA section 9 or seek injunctive relief under section 112.101 of the Tax Code; (3) it is highly speculative that Plaintiffs could obtain legislative consent to sue the state for a tax refund; and (4) Plaintiffs have demonstrated through the inconsistent positions taken by the Defendants that it is unlikely that a refund could be obtained even if suit were allowed. In any event, the Court finds that there is a sufficient amount of uncertainty concerning each of the state remedies described above as to make them speculative. The Tax Injunction Act is therefore inapplicable. Rosewell, 450 U.S. at 516-17.

II. THE PRINCIPLES OF COMITY AND DOCTRINES OF ABSTENTION DO NOT WARRANT A DISMISSAL OF THIS ACTION.

Defendants urge the Court to adhere to the equitable principle of comity by declining to interfere with the state's ASTA tax collection process. They base this alternative argument primarily on the decisions by the U.S. Supreme Court in Fair Assessment in Real Estate Association, Inc. v. McNary, 102 S.Ct. 177 (1980), and the Ninth Circuit in Ashton v. Cory, 780 F.2d 816 (9th Cir. 1986), which Defendants contend stand for the proposition that comity concerns may constitute a bar to an action separate and apart from the Tax Injunction Act itself. Judge Kennedy in the Ashton decision did conclude that "the interest in uniformity [in ERISA law] . . . yields here to the paramount principles of comity and deference to the revenue collection procedures of the individual states provided the state courts afford a plain, speedy, and efficient remedy for challenging state assessments." Id. at 822 (emphasis added). In the F.A.I.R. case, the Supreme Court held that "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." F.A.I.R., 102 S. Ct. at 186 (sic). The Court further held, however, that "such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of

the state decisions in this Court." Id. (citations omitted) (emphasis added).

The Court has previously found the purported state remedies in this case to be unavailable and inadequate for purposes of the Tax Injunction Act. It is clear therefore that a consideration of the principle of comity as an alternative jurisdictional bar to this action is inappropriate under the authorities relied upon by Defendants. The Court therefore rejects Defendants' comity argument.

The Court also finds that abstention is not proper under the circumstances presented in this ERISA case. See General Motors Corp. v. California Board of Equalization, 815 F.2d 1305 (9th Cir. 1987), cert. denied, 108 S.Ct. 1122 (1988); Medema v. Medema Builders, Inc., 854 F.2d. 210 (7th Cir. 1988).

III. THE ELEVENTH AMENDMENT IS NOT A JURISDICTIONAL BAR IN THIS CASE.

Defendants urge in their memorandum of law as their final argument for dismissal that "all causes of action for money damages or other relief against the State of Texas are absolutely barred by the Eleventh Amendment." In the interest of judicial economy, the Court will not describe the various responses filed by the Plaintiffs to this rather broad generalized assertion of immunity. The Fifth Circuit recently described the law applicable to this

issue in Brennan v. Stewart, 835 F.2d 1248 (5th Cir. 1988);

> The Eleventh Amendment and the doctrine of Ex Parte Young, together create a relatively simple rule of state immunity. Basically, prospective injunctive or declaratory relief against a state is permitted--whatever its financial side-effects--but retrospective relief in the form of a money judgment in compensation for post (sic) wrongs--no matter how small--is barred.

Id. at 1253. This Court, in applying the Brennan guidelines, must separately examine each claim to determine if that claim is barred by the Eleventh Amendment. Pennhurst State School v. Haldeman, 465 U.S. 89, 121 (1984).

A state's right to invoke the Eleventh Amendment may be curtailed by a Congressional enactment which indicates an intent to abrogate its immunity. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The Supreme Court has held that states may be sued in federal court where Congress has passed a statute, pursuant to one of its exclusive legislative powers, in which it has expressed an intent that suits against the state under the statute not be barred by the Eleventh Amendment. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985). Once a Congressional waiver of a state's Eleventh Amendment immunity has been established, a plaintiff may obtain

monetary relief notwithstanding the fact that such funds will be paid by the state. 13 C. Wright & A. Miller, Federal Practice & Procedure § 3524, at 190 (1986).

ERISA was enacted pursuant to Congress' power under the Commerce Clause. The Congressional findings which prompted ERISA clearly reflect Congress' overriding concern with the substantial impact which employee benefit plans have upon interstate commerce. 29 U.S.C. §§ 1001(a), (b) and (c). Through the enactment of ERISA, Congress sought to "protect interstate commerce and the interests of participants in employee benefit plans . . . by providing for appropriate remedies, sanctions, and ready access to the federal courts." 29 U.S.C. § 1001(b) (emphasis added). In order to effectuate this policy, Congress established employee benefit plan regulation as an exclusive federal concern by eliminating conflicting state and local regulation. 29 U.S.C. § 1144(a). In this connection Congress specifically provided for the preemption of "any State tax law" which relates to employee benefit plans. 29 U.S.C. § 1144(b)(5)(B)(i).

In order to further prevent state regulation which would defeat Congress' intent to protect interstate commerce, Congress authorized plan fiduciaries, participants, and the Secretary of Labor to bring suit seeking appropriate redress for violations of ERISA's preemption clause, including violations deriving from the imposition

of an impermissible state tax law. 29 U.S.C. § 1132(a)(3).[3] Significantly, section 1132(a)(3) does not exclude suits seeking redress for violation of the ERISA preemption clause caused by the enactment of an impermissible state tax law. Consequently, under a plain reading of the statute, Congress authorized suits to obtain relief for a state's violation of the preemption clause through the enactment of a state tax law which relates to employee benefit plans. Congress not only authorized such suits, but also vested the exclusive jurisdiction for such suits in the federal district courts. 29 U.S.C. § 1132(e)(1). By vesting the exclusive jurisdiction of civil actions relating to the preemption of state tax laws in the federal district courts, Congress has abrogated the state's Eleventh Amendment immunity. Consequently, Plaintiffs' claim for restitution of taxes paid pursuant to ASTA is not prohibited by the Eleventh Amendment.

Furthermore, Plaintiffs' claims for recovery of attorneys' fees are also not prohibited by the Eleventh Amendment. The

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[3]29 U.S.C. § 1132(a)(3) authorizes civil actions by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates the provisions of ERISA or to obtain other appropriate equitable relief to redress such violations. In the instant case Plaintiffs seek the restitution of tax payments unlawfully exacted. Under general law, a claim for such relief is regarded as equitable in nature. See Curtis v. Loether (sic), 415 U.S. 189, 197 (1974). Consequently, the reference in section 1132(a)(3) to "other appropriate equitable relief" contemplates the type of relief sought by Plaintiffs.

Supreme Court has recognized that "the line between retroactive and prospective monetary relief cannot be so rigid that it defeats the effective enforcement of prospective relief." Hutto v. Finney, 437 U.S. 678, 690 (1978). Consequently, the Supreme Court has held that expenditures from the state treasury which are ancillary to a claim for prospective injunctive or declaratory relief are not barred by the Eleventh Amendment. Milliken v. Bradley, 433 U.S. 167 (1977); Brennan, 834 F.2d at 1253. Attorneys' fees have been recognized by the Supreme Court as a type of such ancillary relief. Hutto, 437 U.S. at 691.

An award of attorneys' fees in this case is necessary for the effective enforcement of Plaintiffs' claims for prospective injunctive and declaratory relief. The provisions of ERISA indicate Congress' concern with respect to providing individuals such as Plaintiffs "ready access to the federal courts" to seek redress for ERISA violations. 29 U.S.C. § 1001(b). In order to further ensure the availability of such access, Congress provided for the recovery of attorneys' fees. 29 U.S.C. § 1132(g)(1). Consequently, in order for Plaintiffs to obtain full and effective redress for Defendants' violations of ERISA, the recovery of attorneys' fees is necessary ancillary relief to Plaintiffs' claims for declaratory and injunctive relief.

For all of the foregoing reasons, the Court finds that Defendants' Motions to Dismiss lacks merit and should be Denied.

IT IS THEREFORE ORDERED that Defendants' Motions to Dismiss are hereby DENIED.

SIGNED and ENTERED this 17th day of November, 1988.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

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| E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL AND SURGICAL INSURANCE PLAN, ET AL. | § | CIVIL NO. A-89-CA-148 |
| VS. | § | |
| A. W. POGUE, COMMISSIONER OF THE TEXAS STATE BOARD OF INSURANCE | § | |

ORDER

Before the Court is Plaintiff's Motion for Summary Judgment, as well as Defendant's response. The Court has previously granted summary judgment for Plaintiffs arguing that the Administrative Services Tax Act ("ASTA"), Tex. Ins. Code Ann. art. 4.11A (Vernon Supp. 1988) is preempted by the Employee Retirement Income Security Act ("ERISA"). See Birdsong v. Olson, 708 F. Supp. 792 (W.D. Tex. 1989).

A. Standard of review

Rule 56(c) permits the Court to grant a motion for summary judgment when it appears from the affidavits and other exhibits on file with the Court that there is no genuine issue of

material fact for trial, and when the movant is entitled to summary judgment as a matter of law. FED. R. CIV. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, the Court must view the evidence in the light most favorable to the party opposing the motion, and indulge all reasonable inferences in that party';s favor. Pharo v. Smith, 621 F.2d 656, 664 (5th Cir. 1980).

The Supreme Court's 1986 summary judgment trilogy is by now well-known. In the three cases, the Court set out new rules governing the application of Rule 56. In the first case, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the Court discussed the difference between "material" and "immaterial" issues of fact. The Court stated that a "material" issue is one that could affect the outcome of the suit under the applicable law. Id. at 248. The second case was Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In that case, the Court held that a movant for summary judgment can prevail by showing that its opponent is unable to produce evidence in support of its claim, and that no affidavits or other summary judgment evidence is necessary in such a situation. Id. at 322-24. Finally, in Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Court held that when a movant produces a prima facie case, the opposing party must come forward with specific facts to show that there

is a genuine issue for trial, or else summary judgment is proper. Id. at 587.

Defendant contends that there are genuine issues of material fact as to whether the health plans at issue are health and welfare plans as defined by ERISA, and as to the funding of the health plans and how and by whom the contributions ar (sic) received. Defendant, however, has failed to present any evidence controverting Plaintiff's affidavits, and cannot rest on their pleadings to establish a genuine issue of material fact. Galindo v. Precision American Corp., 754 F.2d 112 (sic), 1216 (5th Cir. 1985). The Court finds that there is no genuine issue as to the following facts.

B. Findings of Fact

Plaintiffs are either benefit plans that provide medical, dental, hospital, accident, death, and/or disability benefits for employees, including benefits for employees in Texas, trusts through which those plans are funded, or administrators and/or sponsoring employers of the plans. As such, the plans are employee welfare benefit plans under ERISA. The plans are self-insured in whole or in part and receive funds from their sponsoring employers from which the plans pay compensation for administrative services performed in Texas and from which the plans also pay claims and benefits. The taxes paid to Defendant pursuant

to ASTA and in relation to the Plaintiffs herein total $1,658,639.25.

C. Conclusions of Law

Plaintiffs are in the same position as the plaintiffs in Birdsong and are entitled to the entry of summary judgment for the reasons set forth in the opinion earlier rendered by this Court. Birdsong v. Olson, 708 F.Supp 792 (W.D. Tex. 1989). The Court will consider any application for attorneys' fees and costs which Plaintiffs may file, but states no opinion whether assessment of fees and costs is authorized or appropriate in this case.

Plaintiffs contend that they are entitled to an award of prejudgment interest pursuant to 29 U.S.C. §1132(a)(3)(B), which permits fiduciaries, beneficiaries, and participants to bring a civil action to obtain appropriate equitable relief. Plaintiffs acknowledge that ERISA does not expressly address the awarding of interest, but contend that the legislative intent and general principles of equity compel such an award. See Rodgers v. United States, 332 U.S. 371, 373 (1947); see also National Home for Disabled Volunteer Soldiers v. Parrish, 229 U.S. 494 (1913). The Fifth Circuit has held that the award of prejudgment interest in ERISA cases is discretionary with the trial court. Whitfield v. Lindemann, 853 F.2d 1298, 1306 (5th Cir. 1988). The purposes of ERISA are set out in 29 U.S.C. § 1001, and include preserving the financial

soundness of employee welfare plans. A common sense reading of the statute leads the Court to conclude that an award of prejudgment interest is warranted when a state has collected taxes contrary to the preemption clause of ERISA. Considerations of fairness should guide the trial court in making its determination. Blau v. Lehman, 368 U.S. 403, 414 (1962). An award is appropriate to compensate for use of the funds. Lindemann, 853 F.2d at 1306. This Court concludes that the State of Texas has enjoyed the interest-free use of the taxes paid under ASTA. Pursuant to Tex. Tax Code Ann. § 112.058(e)(2) (Vernon Supp. 1988), the tax funds may not be placed in a suspense account but shall be immediately deposited.

Plaintiffs request prejudgment interest only on the taxes paid directly to the state, and not on taxes paid in interest bearing accounts pursuant to a temporary restraining order entered by a state court. Plaintiffs request that prejudgment interest be awarded at the rate set forth in 28 U.S.C. § 1961(a):

> at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

The Court is of the opinion that an award of prejudgment interest is appropriate, but that 28 U.S.C. § 1961(a) is not necessarily the proper method for calculating that interest. The Fifth Circuit in Lindemann suggests that the rate of income received by an ERISA plan in its investments is the appropriate measure for prejudgment interest, 853 F.2d at 1306, and Plaintiffs have presented no evidence regarding this rate. The Court will deny Plaintiffs' request for prejudgment interest at this time.

ACCORDINGLY, IT IS ORDERED that Plaintiffs' Motion for Summary Judgment is GRANTED; and that judgment is hereby entered in favor of the Plaintiffs.

IT IS FURTHER ORDERED that Article 4.11A of the Texas Insurance Code, also known as the Administrative Service (sic) Tax Act, is null and void under the Supremacy Clause of the United States Constitution to the extent that it imposes a tax on any ERISA-covered employee welfare benefit plan or any such plan's sponsoring employers, fiduciaries, employee participants, or administrative service providers, including the Plaintiffs herein.

IT IS FURTHER ORDERED that Defendant and his agents are enjoined from seeking, directly or indirectly, to collect from any of the Plaintiffs herein, any of Plaintiffs' sponsoring employers, employee participants, or their administrative services providers, the tax or any portion thereof

imposed by Article 4.11A, and from attempting to enforce the provisions, directly or indirectly, of Article 4.11A, including but not limited to the commencement of any administrative or judicial proceedings related to Article 4.11A.

IT IS FURTHER ORDERED that Defendant shall return all tax payments and estimated tax payments made under Article 4.11A to Plaintiffs.

SIGNED AND ENTERED this 7th day of July, 1989.

/s/ James R. Nowlin
JAMES R. NOWLIN
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

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| LA QUINTA MOTOR INNS, INC. | § | |
| | § | |
| VS. | § | CIVIL NO. |
| | § | A-89-CA-447 |
| RICHARD F. REYNOLDS AS | § | |
| A MEMBER OF THE TEXAS | § | |
| STATE BOARD OF | § | |
| INSURANCE, ET AL. | § | |

ORDER

Before the Court is the Motion of Plaintiff La Quinta Motor Inns, Inc. for Summary Judgment, as well as Defendants' response, and Plaintiff's reply. The Court has previously granted summary judgment for Plaintiffs arguing that the Administrative Services Tax Act ("ASTA"), Tex. Ins. Code Ann. art. 4.11A (Vernon Supp. 1988) is preempted by the Employee Retirement Income Security Act ("ERISA"). See Birdsong v. Olson, 708 F. Supp. 792 (W.D. Tex. 1989).

A. Standard of review

Rule 56(c) permits the Court to grant a motion for summary judgment when it appears from the affidavits and other exhibits on file

with the Court that there is no genuine issue of material fact for trial, and when the movant is entitled to summary judgement as a matter of law. FED. R. CIV. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, the Court must view the evidence in the light most favorable to the party opposing the motion, and indulge all reasonable inferences in that party's favor. Pharo v. Smith, 621 F.2d 656, 664 (5th Cir. 1980).

The Supreme Court's 1986 summary judgment trilogy is by now well-known. In the three cases, the Court set out new rules governing the application of Rule 56. In the first case, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the Court discussed the difference between "material" and "immaterial" issues of fact. The Court stated that a "material" issue is one that could affect the outcome of the suit under the applicable law. Id. at 248. The second case was Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In that case, the Court held that a movant for summary judgment can prevail by showing that its opponent is unable to produce evidence in support of its claim, and that no affidavits or other summary judgment evidence is necessary in such a situation. Id. at 322-24. Finally, in Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Court held that when a movant produces a prima facie case, the opposing party must come forward with specific facts to show that there

is a genuine issue for trial, or else summary judgment is proper. Id. at 587.

Defendants contend that there are genuine issues of material fact as to whether the health plan is a health and welfare benefit plan as defined by ERISA, and as to the funding of the health plan and how and by whom the contributions are received. Defendants, however, have failed to present any evidence controverting Plaintiff's affidavit, and cannot rest on its pleadings to establish a genuine issue of material fact. Galindo v. Precision American Corp., 754 F.2d 1212, 1216 (5th Cir. 1985). The Court finds that there is no genuine issue as to the following facts.

B. Findings of Fact

La Quinta Employee Health Plan ("the health plan") is sponsored, maintained and contributed to by Plaintiff, La Quinta Motor Inns, Inc., a business engaged in commerce for the purpose of providing health and medical benefits to its employees, including employees in Texas, who are participants in the health plan. As such, the health plan is an employee welfare benefit plan under ERISA. Plaintiff undertakes certain administrative and management functions and obligations in connection with the health plan, and as such is a fiduciary under ERISA. Plaintiff exercises discretionary authority and control over the management of the health plan, in that it has the authority to appoint a plan

administrator and amend or terminate the health plan.

Benefits under the health plan are funded primarily through the contributions of Plaintiff, and in some instances, the health plan's participants. The health plan is self-funded and self-administered. Except for excess stop-loss coverage, the health plan does not purchase insurance for the purposes of providing benefits to its participants or otherwise transfer or spread risk through insurance policies or contracts.

Plaintiff has filed tax returns under protest pursuant to ASTA for 1988 and the first quarter of 1989, and has remitted taxes in the amounts of $50,612.00 and $12,553.00, respectively.

C. Conclusions of Law

Plaintiff fits squarely in the position of the plaintiffs in Birdsong and is entitled to the entry of summary judgment for the reasons set forth in the opinion earlier rendered by this Court. Birdsong v. Olson, 708 F. Supp. 792 (W.D. Tex. 1989). Plaintiff requests the award of reasonable attorneys' fees and costs. The Court will consider any application for attorney's fees and costs which Plaintiff may file, but states no opinion whether assessment of fees and costs is authorized or appropriate in this case.

Plaintiff requests interest on the tax payments to be returned as is allowed by law. Plaintiff does not specify whether it is seeking pre- or postjudgment interest, or both. Plaintiffs in other ASTA cases have contended that they are entitled to an award of prejudgment interest pursuant to 29 U.S.C. §1132(a)(3)(B), which permits fiduciaries, beneficiaries, and participants to bring a civil action to obtain appropriate equitable relief. These plaintiffs acknowledge that ERISA does not expressly address the awarding of interest, but contend that the legislative intent and general principles of equity compel such an award. See Rodgers v. United States, 332 U.S. 371, 373 (1947); see also National Home for Disabled Volunteer Soldiers v. Parrish, 229 U.S. 494 (1913). The Fifth Circuit has held that the award of prejudgment interest in ERISA cases is discretionary with the trial court. Whitfield v. Lindemann, 853 F.2d 1298, 1306 (5th Cir. 1988). The purposes of ERISA are set out in 29 U.S.C. § 1001, and include preserving the financial soundness of employee welfare plans. A common sense reading of the statute leads the Court to conclude that an award of prejudgment interest is warranted when a state has collected taxes contrary to the preemption clause of ERISA. Considerations of fairness should guide the trial court in making its determination. Blau v. Lehman, 368 U.S. 403, 414 (1962). An award is appropriate to compensate for use of the funds. Lindemann, 853 F.2d at 1306. This Court concludes that the State of Texas has enjoyed

the interest-free use of the taxes paid under ASTA. Pursuant to Tex. Tax Code Ann. §112.058(d)(2) (Vernon Supp. 1988), the tax funds may not be placed in a suspense account but shall be immediately deposited.

Other Plaintiffs have requested prejudgment interest be awarded at the rate set forth in 28 U.S.C. § 1961(a):

> at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

The Court is of the opinion that an award of prejudgment interest is appropriate, but that 28 U.S.C. § 1961(a) is not necessarily the proper method for calculating that interest. The Fifth Circuit in Lindemann suggests that the rate of income received by an ERISA plan in its investments is the appropriate measure for prejudgment interest, 853 F.2d at 1306, and Plaintiffs have presented no evidence regarding this rate. The Court will deny Plaintiffs' request for prejudgment interest at this time, awaiting clarification from Plaintiff as to the type of interest sought, and the appropriate interest rate.

IT IS HEREBY ORDERED that the Motion of Plaintiff La Quinta Motor Inns, Inc. for Summary Judgment is GRANTED;

IT IS FURTHER ORDERED that Plaintiff, La Quinta Motor Inns, Inc. is Granted the following relief:

(a) A declaratory judgment that Article 4.11A is preempted by ERISA, and consequently null and void under the Supremacy Clause of the United States Constitution, to the extent that it imposes a tax on any ERISA-covered employee benefit plan or any such plan's sponsoring employers, fiduciaries, employee participants, or administrative service providers, including La Quinta Motor Inns, Inc.;

(b) A permanent injunction barring Defendants and their agents from seeking, directly or indirectly, to collect, from La Quinta Motor Inns, Inc., the La Quinta Employee Health Plan for which La Quinta serves as a fiduciary and sponsor, La Quinta's employee participants, or it administrative service providers, the tax or any portion thereof imposed by Article 4.11A, and from otherwise attempting to enforce the provisions, directly or indirectly, of Article 4.11A, including but not limited to

the commencement of any administrative or judicial proceedings related to Article 4.11A; and

(c) A permanent injunction ordering the return of all tax payments and estimated tax payments, made by La Quinta Motor Inns, Inc. or the La Quinta Employee Health Plan pursuant to Article 4.11A, to the State Board of Insurance.

SIGNED AND ENTERED this 7th day of July, 1989.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

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| E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL AND SURGICAL INSURANCE PLAN, ET AL. | § | |
| VS. | § | CIVIL NO. A-89-CA-148 |
| A. W. POGUE, COMMISSIONER OF (sic) | § | |

ORDER

Before the Court is Plaintiff's Motion and Brief in Support of an Award of Prejudgment and Post-Judgment Interest filed August 16, 1989. Upon review of the motion and brief, the responses filed, and the entire file of this case the Court finds said motion has merit and should be Granted.

An award of prejudgment interest in ERISA cases is discretionary with the Court. See Whitfield v. Lindemann, 853 F.2d 1298, 1306 (5th Cir. 1988). Considerations of fairness should guide the trial court in determining whether such relief should be granted. Blau v. Lehman, 368 U.S. 403, 414 (1962). The purposes of ERISA are set out in 29 U.S.C. Section 1001, and include preserving the financial soundness of employee

welfare plans. A common sense reading of the statute leads the Court to conclude that an award of prejudgment interest is warranted when a state has collected taxes contrary to the preemption clause of ERISA. This Court finds that the State of Texas has enjoyed the interest-free use of the taxes paid under ASTA. An award is appropriate to compensate for use of the funds. See Lindemann, 853 F.2d at 1306. While the Court finds an award of prejudgment interest proper, the Court is also of the opinion that 28 U.S.C. Section 1961(a) is not necessarily the most appropriate method for calculating that interest. The Fifth Circuit in Lindemann suggests that the rate of income received by an ERISA plan in its investments is the appropriate measure for prejudgment interest. See Id. Plaintiffs have provided the Court evidence of those investment rates by various affidavits. Upon review of the affidavits, the Court finds an award of prejudgment interest pursuant to those rates would most adequately compensate the Plaintiffs for the use of funds.

ACCORDINGLY, IT IS ORDERED that Plaintiffs' Motion in Support of An Award of Prejudgment and Post-Judgment Interest is GRANTED.

IT IS FURTHER ORDERED that an award of prejudgment interest is appropriate only on the taxes paid directly to the State, and not on taxes paid in interest bearing accounts pursuant to a temporary restraining order entered by the state

court. An award of prejudgment interest is granted as follows:

a. Plaintiffs E-Systems, Inc. Group Hospital Medical and Surgical Insurance Plan, E-Systems, Inc. Group Hospital, Medical, Surgical, Major Medical, Prescription Drug and Weekly Income Disability Benefit Plans, E-Systems, Inc. Group Hospital, Medical, Surgical, Major Medical and Weekly Income Disability Benefit Plan, E-Systems, Inc. Health Care and Weekly Income Disability Plans, E-Systems, Inc. Dental Expense Coverage Plan (a/k/a E-Systems, Inc. Group Dental Plan), E-Systems, Inc. Employee Benefit Trust, First RepublicBank Dallas, National Association, Trustee, with its principal office in Dallas, Dallas County, Texas, are awarded the following prejudgment interest:

| Payment Date | Payment Amount | Rate | Prejudgment Interest |
|---|---|---|---|
| March 4, 1988 | $ 407,330.00 | 8.59% | $ 48,031.00 |

b. US Sprint Group Health Insurance Plan is awarded the following prejudgment interest:

| Payment Date | Payment Amount | Rate | Prejudgment Interest |
|---|---|---|---|
| April 28, 1988 | $ 24,950.00 | 9.00% | $ 2,714.99 |
| May 13, 1988 | $ 10,535.18 | 9.00% | $ 1,103.90 |

c. Kimberly-Clark Corporation Medical Plan, Kimberly-Clark Corporation Dental Plan, Kimberly-Clark Health Benefits Trust, the First National Bank of Neenah, Trustee, a Wisconsin corporation with its principal office in Neenah,

Wisconsin, are awarded the following prejudgment interest:

| Payment Date | Payment Amount | Rate | Prejudgment Interest |
|---|---|---|---|
| March 1, 1988 | $ 38,453.27 | 7.725% | $ 4,092.67 |
| May 25, 1988 | $ 16,479.97 | 7.725% | $ 1,434.63 |

d. Spenco Group Medical Plan is awarded the following prejudgment interest:

| Payment Date | Payment Amount | Rate | Prejudgment Interest |
|---|---|---|---|
| March 1, 1988 | $ 5,673.06 | 8.346% | $ 653.34 |
| May 13, 1988 | $ 2,431.31 | 8.346% | $ 236.03 |

e. Group Life and Health Insurance Plan for Hourly Employees Represented by the American Federation of Grain Millers, The Employee Group Insurance Plan for Pillsbury General Hourly Employees, Steak & Ale Group Benefit Plan for Restaurant Hourly Employees, The Group Insurance Plan for Pillsbury Salaried Employees, The Group Insurance Plan for Burger King Hourly Employees, The Group Insurance Plan for Burger King Salaried Employees, The Pillsbury Group Employees Health Benefit Trust, First Bank (formerly First National Bank of Minneapolis), National Association, Trustee, with its principal office in Minneapolis, Minnesota, are awarded the following prejudgment interest:

| Payment Date | Payment Amount | Rate | Prejudgment Interest |
|---|---|---|---|
| March 1, 1988 | $ 79,133.00 | 8.312% | $ 9,075.58 |
| May 13, 1988 | $ 33,914.00 | 8.312% | $ 3,278.89 |

f. The Greyhound Lines, Inc., Salaried Employees Medical, Dental Benefits Plan ASO-19861-7, Eagle Manufacturing, Inc. Salaried Employees Medical, Dental Benefits Plan ASO-19861-7 (formerly ASO-19827-7 and a/k/a Eagle Manufacturing, Inc. Salaried Employees Medical Benefits Plan), are awarded the following prejudgment interest:

| Payment Date | Payment Amount | Rate | Prejudgment Interest |
|---|---|---|---|
| March 1, 1988 | $ 13,721.89 | 11.770% | $ 2,248.17 |
| May 13, 1988 | $ 5,880.80 | 11.770% | $ 808.77 |

g. Shell Hospital Surgical Medical Program, Shell Hospital Surgical Medical Program Trust, Texas Commerce Bank, National Association, Trustee, are awarded the following prejudgment interest:

| Payment Date | Payment Amount | Rate | Prejudgment Interest |
|---|---|---|---|
| March 1, 1988 | $ 573,851.68 | 8.321% | $ 65,890.00 |
| May 13, 1988 | $ 245,936.43 | 8.321% | $ 23,805.00 |

Shell Dental Assistance Plan, Shell Dental Assistance Plan Trust, Texas Commerce Bank, National Association, Trustee, are awarded the following prejudgment interest:

| Payment Date | Payment Amount | Rate | Prejudgment Interest |
|---|---|---|---|
| March 1, 1988 | $ 54,425.32 | 8.331% | $ 6,257.00 |
| May 13, 1988 | $ 23,325.14 | 8.331% | $ 2,261.00 |

h. Greyhound Lines, Inc. - Amalgamated Council Health and Welfare Plan, Greyhound

Lines, Inc. - Amalgamated Council Health and Welfare Trust, Kevin Bolton, Mike Doyle, Anthony Lannie, Judy Collins, L. L. Petrie, Robert Tancos, Jerry Hatalla, James Cushing-Murray, James W. Norman, Paul Owsley, Ed Strait, and Smith Williamson, Trustees, are awarded the following prejudgment interest:

| Payment Date | Payment Amount | Rate | Prejudgment Interest |
|---|---|---|---|
| March 8, 1988 | $ 4,168.00 | 7.262% | $ 410.33 |
| March 9, 1988 | $ 3,126.00 | 7.262% | $ 307.08 |
| May 13, 1988 | $ 3,126.00 | 7.262% | $ 263.71 |

i. Texas Carpenters Health Benefit Fund, and Texas Carpenters Health Benefit Trust, Harold E. Moore, J. P. Long, Jr., Joe Smith, Herb Kratz, Chip Walker, Ray Hernandez, Wade Andres, and John Stuart, Trustees, are awarded the following prejudgment interest:

| Payment Date | Payment Amount | Rate | Prejudgment Interest |
|---|---|---|---|
| March 1, 1988 | $ 78,524.88 | 8.311% | $ 9,005.37 |
| June 1, 1988 | $ 33,653.52 | 8.311% | $ 3,095.84 |

IT IS FURTHER ORDERED that post-judgment interest shall accrue against all ASTA taxes paid to Defendant by or on behalf of the plans sponsored by Plaintiffs herein, at the rate specified in 28 U.S.C. § 1961(a) from July 8, 1989, said rate being 8.16% until paid by Defendant herein pursuant to this Court's Order.

SIGNED AND ENTERED this 22nd day of June, 1990.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

| | | |
|---|---|---|
| LA QUINTA MOTOR INNS, INC. ET AL. | § | |
| VS. | § | CIVIL NO. A-89-CA-447 |
| RICHARD F. REYNOLDS AS A MEMBER OF THE TEXAS STATE BOARD OF INSURANCE, ET AL. | § | |

ORDER

Before the Court is Plaintiff's Motion for Prejudgment and Post-Judgment Interest filed August 3, 1989. Upon review of the motion, the response filed, and the entire file of this case the Court finds said motion shows merit and should be GRANTED.

An award of prejudgment interest in ERISA cases is discretionary with the Court. See Whitfield v. Lindemann, 853 F.2d 1298, 1306 (5th Cir. 1988). Considerations of fairness should guide the trial court in determining whether such relief should be granted. Blau v. Lehman, 368 U.S. 403, 414 (1962). The purposes of ERISA are set out in 29 U.S.C. Section 1001, and include

preserving the financial soundness of employee welfare plans. A common sense reading of the statute leads the Court to conclude that an award of prejudgment interest is warranted when a state has collected taxes contrary to the preemption clause of ERISA. This Court finds that the State of Texas has enjoyed the interest-free use of the taxes paid under ASTA. An award is appropriate to compensate for use of the funds. See Lindemann, 853 F.2d at 1306. While the Court finds an award of prejudgment interest proper, the Court is also of the opinion that 28 U.S.C. Section 1961(a) is not necessarily the most appropriate method for calculating that interest. The Fifth Circuit in Lindemann suggests that the rate of income received by an ERISA plan in its investments is the appropriate measure for prejudgment interest. See Id. Plaintiffs have provided the Court evidence of those investment rates by affidavit. Upon review of the affidavit, the Court finds an award of prejudgment interest pursuant to those rates would most adequately compensate the Plaintiffs for the use of funds.

ACCORDINGLY, IT IS ORDERED that Plaintiffs' Motion for Prejudgment and Post-Judgment Interest is GRANTED.

IT IS FURTHER ORDERED that Defendants pay La Quinta Motor Inns, Inc. $ 4,770.93 in prejudgment interest as calculated in Plaintiff's affidavit.

IT IS FURTHER ORDERED that Defendants pay La Quinta postjudgment interest calculated at the rate of 8.16% as set out in 28 US.C. (sic) § 1961(a) on $69,749.00, the total amount of taxes paid by La Quinta Motor Inns, Inc pursuant to Article 4.11A of the Texas Insurance Code, computed from July 17, 1989, the date of final judgment herein.

SIGNED AND ENTERED this 22nd day of June, 1990.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 89-1707, 89-1709
90-8457 and 90-8460

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E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL AND SURGICAL INSURANCE PLAN, ET AL.,
Plaintiffs-Appellees,

versus

A. W. POGUE, Commissioner of the Texas State Board of Insurance,
Defendant-Appellant.

LA QUINTA MOTOR INNS, INC.
Plaintiff-Appellee,

versus

RICHARD F. REYNOLDS, As a Member of the Texas State Board of Insurance, ET. AL.,
Defendants-Appellants.

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Appeals from the United States District Court
for the Western District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion May 1, 5 Cir., 1991, ___ F.2d ___)
(JUNE 10, 1991)

Before BROWN, POLITZ and JOHNSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:
/s/Henry A. Politz
United States Circuit Judge